No. 13526

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MIGUEL GONZALEZ-MARTINEZ,

Appellant,

vs.

H. R. LANDON, Los Angeles Director, Immigration and Naturalization Service, and U. L. PRESS, Officer in Charge in San Diego, Immigration and Naturalization Service,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEES.

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TABLE OF AUTHORITIES CITED

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BRIEF OF APPELLEES.

Jurisdiction.

The District Court has jurisdiction of appellant's Petition for a Writ of Habeas Corpus [T. R. 2] pursuant to the provisions of Title 28, U. S. C. 2241, and of the appellees who appeared and filed their Return to Petition for Writ of Habeas Corpus [T. R. 7] in response to the District Court's Order Granting Writ of Habeas Corpus [T. R. 5].

This Court has jurisdiction of this appeal from the District Court's Order Dismissing Petition for Writ of

Habeas Corpus [T. R. 19] (which Order should discharge the Writ previously issued) [T. R. 5], pursuant to the provisions of Title 28, U. S. C. 2253.

Statutes Involved.

The Act of February 5, 1917, as amended December 8, 1942, (8 U. S. C. 155) contains several provisions which are pertinent to this case, as follows:

"§*155. Deportation of Undesirable Aliens Generally.*

155(a) * * * Any alien who * * * admits the commission, prior to entry, of * * * a crime * * * involving moral turpitude; * * * shall, upon warrant of the Attorney General, be taken into custody and deported * * *

155(c) In any case of an alien (other than one to whom subsection (d) is applicable) who is deportable * * * and who has *proved good moral character* for the preceding five years, the Attorney General *may* * * *

(1) Permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or

(2) Suspend deportation of such alien * * *" (Emphasis supplied.)

"155(d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under * * *

(4) Any of the provisions of subsection (a) of this Section * * *"

The Act of May 26, 1924 (8 U. S. C. 213) reads as follows:

> "§213. *Compliance with immigration requirements; persons ineligible to citizenship; penalties.*
>
> (a) *Persons not to be admitted.* No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent; * * *"

Section 2 of the Act of March 4, 1929 (8 U. S. C. 180a) reads as follows:

> "§180a. *Entry of alien at improper time or place; eluding examination or inspection; misrepresentation and concealment of facts; penalty.*
>
> Any alien who after March 4, 1929, enters the United States at any time or place other than as designated by immigration officials or eludes examination or inspection by immigration officials, or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor * * *."

Section 1(a) of the Act of March 4, 1929, as amended June 14, 1940 (8 U. S. C. 180(a)), reads as follows:

> "§180. *Reentry or attempted reentry of deported alien; penalty; deported seamen as entitled to landing privileges.*
>
> (a) If any alien has been arrested and deported in pursuance of law, he shall be excluded from admission to the United States whether such deportation took place before or after March 4, 1929, * * *."

Statement of the Case.

The principal issue in this action is whether the alien is entitled to have the Attorney General exercise his discretion pursuant to 8 U. S. C. 155(c), when it appears from the record that appellant is not eligible for suspension for two reasons: (1) Because he has not proved good moral character for five years preceding September 10, 1951, the date appellant applied for suspension of deportation, and (2) Because he has committed a crime involving moral turpitude, either of which facts disqualify appellant for discretionary relief.

This latter question is raised in Point III of appellant's Argument (App. Br. 4) where appellant argues the Court erred in holding the Attorney General "was not bound to exercise his discretion" [T. R. 19].

Points I and II of appellant's Argument (App. Br. 4) claim error because the lower court did not decide the question of whether or not bigamy is a crime involving moral turpitude, whereas it is appellees' contention that since appellant was ineligible for suspension on other grounds, it was unnecessary for the Court to decide that issue; however, there is no reason why this Court cannot decide that question on this appeal.

We do not think Point II of appellant's Argument (App. Br. 4) raises an issue in this case. Appellees raise no question of jurisdiction of the District Court to entertain appellant's Application for Writ of Habeas Corpus or to review the record of the deportation proceedings before the Immigration and Naturalization Service, in the District Court proceeding.

Summary of Argument.

I.

BRIEF STATEMENT OF FACTS.

II.

THE ALIEN IS NOT ENTITLED TO HAVE THE ATTORNEY GENERAL EXERCISE HIS DISCRETION REGARDING SUSPENSION OF DEPORTATION UNDER 8 U. S. C. 155(c) BECAUSE (1) HE HAS NOT PROVED GOOD MORAL CHARACTER FOR FIVE YEARS PRECEDING SEPTEMBER 10, 1951, AND (2) BECAUSE SECTION 155(c) DOES NOT APPLY TO THIS ALIEN BECAUSE HE IS DEPORTABLE AS AN IMMORAL PERSON, TO-WIT: A PERSON WHO HAS COMMITTED BIGAMY, A CRIME INVOLVING MORAL TURPITUDE PURSUANT TO SECTION 155(d).

III.

BIGAMY IS A CRIME INVOLVING MORAL TURPITUDE.

ARGUMENT.

I.

Brief Statement of Facts.

A short chronology of the facts which are not disputed by the pleadings and which are supported by the record, segregated as to the (1) facts relating to appellant's marriages, (2) the facts relating to the Immigration proceedings, and (3) the Court proceedings, are as follows:

Marriages.

August	29, 1939	Petitioner married to Maria Rita Dominguez in Mexico.
	1944	Petitioner claims to have paid an attorney to start proceedings for divorce but admits he knew that no action was taken [Ex. A in evidence, Hearing July 20, 1951, pp. 7, 8 and 9].
November	21, 1945	Petitioner married to Enriqueta Mestis in the United States.
March	16, 1950	Petitioner divorces wife No. 1, Maria Rita Dominguez.
May	22, 1950	Petitioner remarries wife No. 2, Enriqueta Mestis.

Entries Into United States and Immigration Proceedings.

May	7, 1947	Petitioner illegally reenters near San Ysidro, and in Criminal Proceeding 10934, sentence of a year and a day suspended and 5 years' probation given [T. R. 8].
June	9, 1947	Petitioner deported via San Ysidro [T. R. 8].

January 1951	Petitioner illegally reenters United States near San Ysidro [T. R. 8].
July 12 and 20, 1951	Deportation hearings held at San Diego [T. R. 8].
July 26, 1951	Hearing Officer determines petitioner deportable.
September 10, 1951	Application for suspension of deportation denied, and Order of Deportation affirmed [T. R. 9].
December 7, 1951	Appeal dismissed by Board of Immigration Appeals [T. R. 9].
January 14, 1952	Warrant of Deportation issued [T. R. 15], reciting four grounds for deportation.

Court Proceedings.

May 26, 1952	Petition for Writ of Habeas Corpus filed.
May 28, 1952	Court signs Order Granting Writ.
June 12, 1952	Appellees' Return to Writ of Habeas Corpus filed.
June 16, 1952	Stipulation and Order Admitting in Evidence as Exhibit A certified copies of July 12, and July 20, 1952, Immigration and Naturalization Hearings and case submitted upon written Memorandum of Points and Authorities.
July 23, 1952	Order Dismissing Writ of Habeas Corpus by District Court.

II.

The Alien Is Not Entitled to Have the Attorney General Exercise His Discretion Regarding Suspension of Deportation Under 8 U. S. C. 155(c) Because (1) He Has Not Proved Good Moral Character for Five Years Preceding September 10, 1951, and (2) Because Section 155(c) Does Not Apply to This Alien Because He Is Deportable as an Immoral Person to-wit: A Person Who Has Committed Bigamy, a Crime Involving Moral Turpitude Pursuant to Section 155(d).

The grounds for deportation of appellant, as recited in the Warrant of Deportation issued January 14, 1952 [T. R. 15] are four: (1) At time of entry in January, 1951, appellant was not in possession of a valid immigration visa and not exempted from presentation thereof; (2) He entered without inspection; (3) He was an alien previously arrested and deported and had not been granted permission to reapply for admission, and (4) He admits commission of a crime involving moral turpitude, to-wit bigamy.

The provisions of Section 155(c) regarding discretion to suspend deportation are inapplicable to a person who is deportable for admission of a crime involving moral turpitude (see Sec. 155(a) and (d) *supra*) or who fails to prove good moral character for the preceding five years. Appellant admits the facts as outlined in the Statement of Facts above, and that his second marriage was bigamous. That bigamy is a crime involving moral turpitude is discussed under Point III.

It appears from the facts that petitioner was living in a bigamous state up until March 16, 1950, less than five years prior to the proceeding to deport, and those facts alone are sufficient upon which to base a finding that he failed to prove good moral character under the provisions of Section 155(c). The record also shows that since petitioner's second marriage in 1945, he has failed to support the three children of his first marriage [Ex. A in Evidence], which fact also supports a finding of lack of good moral character during the preceding five years. In addition, there is the 1947 sentence under Criminal Case No. 10934 of a year and a day suspended and five years probation to further sustain a finding of failure to prove good moral character during the preceding five years. It therefore appears that petitioner is not entitled to the exercise of discretion to suspend his deportation.

The power of suspending deportation is a discretionary one, and *not* a matter of right.

> *United States ex rel. Weddeke v. Watkins,* 166 F. 2d 369, C. C. A. 2, cert. den. 68, Sup. Ct. 904 (1948).

The Courts cannot review the exercise of discretion. They can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion.

> *United States v. Shaughnessy,* 183 F. 2d 271.

Petitioner is not entitled to a *de novo* hearing on habeas corpus but is limited to a review of the record.

> *Kessler v. Strecker,* 307 U. S. 22, 34.

III.

Bigamy Is a Crime Involving Moral Turpitude.

While it is necessary that the facts admitted by petitioner constitute a "crime involving moral turpitude" before it can be said that he thereby loses the right to the exercise of discretion to suspend deportation, it is not true that the elements of the crime of bigamy as prescribed by the statutes of the State of California are the applicable elements which determine whether or not the crime involves moral turpitude. The standard by which we judge whether or not the "crime" involves moral turpitude is determined by the Immigration and Naturalization Regulations and not by the State Law defining the crime, and it has been so held by both the Immigration and Naturalization Service and sustained by the Courts. However, in the *Matter of E.*, 2 I & N Dec. 328 (A. G. 1945), it was held by the Attorney General that bigamy is a crime involving moral turpitude in Immigration cases despite the fact that the bigamy involved took place in the State of Nevada where the statute was sufficiently broad to include cases of marriage contracted in the honest belief that a prior marriage had been legally terminated.

This latter view is sustained in the case of *Whitty v. Weedin,* 68 F. 2d 127 (C. C. A. 9), in which it is said:

> "[4] Upon the other question presented as to whether or not the crime of bigamy, admitted to have been committed by appellant in Canada before coming to this country, and for which he served a term of imprisonment, was such a crime as involved moral turpitude, the cases cited by appellant, claiming to indicate that under certain conditions a crime of bigamy might not involve moral turpitude, do not

support his position. The crime of bigamy involved moral turpitude.

'It is the conduct of the defendant in marrying the second time which constitutes the crime and it is the abuse of this formal and solemn contract which the law forbids because of its outrage on public decency.' (3 R. C. L. 804.)

By the law of Canada bigamy is declared a crime and its serious nature is revealed by the provision for punishment attached to conviction by imprisonment in the penitentiary for a term of seven years. It is no less a crime in this country, as was well said by Mr. Justice Field:

'Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States. * * * They tend to destroy the purity of marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment.' *Davis v. Beason,* 133 U. S. 333, 341, 10 S. Ct. 299, 300, 33 L. Ed. 637.

The order under review is affirmed."

In *Mercer v. Lence,* 96 F. 2d 122, cert. den. 305 U. S. 611, a deportation order was sustained based upon conviction, in Canada, of the crime of conspiracy to defraud. The alien contended that statutes of Canada must be resorted to in order to determine whether such crime involves moral turpitude but the Court of Appeals for the Tenth Circuit held that "Moral turpitude referred to in said Section 155 of 8 U. S. C. A., as herein, must be determined according to our standard."

In *Jordan v. De George,* 341 U. S. 223, the Supreme Court disagreed with the Circuit Court view that "crimes involving moral turpitude were intended to include only crimes of violence or crimes which are commonly thought of as involving baseness, vileness or depravity." The Supreme Court held that the phrase embraces fraudulent conduct, such as defrauding the government of a tax on liquor.

Respectfully submitted,

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